CRISTINA SEPE, WSBA #53609
BRIAN H. ROWE, WSBA #56817
Assistant Attorneys General
JEFFREY T. EVEN, WSBA #20367
Deputy Solicitor General
800 5th Avenue, Ste. 2000
Seattle, WA 98104
(206) 474-7744

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

ENRIQUE JEVONS, as managing member of Jevons Properties LLC, et al.,

Plaintiffs,

v.

JAY INSLEE, in his official capacity of the Governor of the State of Washington, et al.

Defendants.

NO. 1:20-cv-03182-SAB

DEFENDANTS' SUPPLEMENTAL REPLY BRIEF RE: *CEDAR POINT NURSERY V. HASSID*, 141 S. CT. 2063 (2021)

NOTED FOR: Aug. 24, 2021, at 10:30 a.m.

With Oral Argument

I. INTRODUCTION

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021), does not control the Takings Clause analysis for the now-expired moratorium on evictions. There, the California access regulation—which gave outside labor organizers "a right to take access" to agricultural employers' property—was a *per se* physical taking; it appropriated property owners' "right to exclude" for the government itself or for third parties. *Cedar Point Nursery*, 141 S. Ct. at 2072. Here, the Moratorium did not give uninvited third parties "a right to take access" or invade the Landlords' properties. The Landlords voluntarily invited tenants by renting their units, and the Moratorium temporarily regulated rental relationships by prohibiting the Landlords from expelling their tenants for non-payment of rent. The State did not effect a *per se* taking. The Court should accordingly grant summary judgment to the State on the Takings Clause claim (and all claims).

II. ARGUMENT

The Landlords make three arguments in their supplemental reply brief, ECF No. 55, that mischaracterize precedent and the Moratorium. None of their arguments change this overarching point: For purposes of the Takings Clause, controlling precedent distinguishes between (a) regulations governing the relationship between property owners and those they have voluntarily invited onto their property, from (b) regulations that grant the public the right to invade private property. *See Cedar Point Nursery*, 141 S. Ct. at 2077; *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992).

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

First, the Landlords try to escape *F.C.C. v. Florida Power Corporation* and *Yee v. City of Escondido* by cabining the cases as mere rent control challenges. *See* ECF No. 55 at 2. But in *Yee*, the petitioners challenged a rent control law for mobile homes in conjunction with another law that "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy." 503 U.S. at 524. The petitioners argued that the regime of regulations effected a physical taking, contending "what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land." *Id.* at 527. The Supreme Court rejected the park owners' argument, holding that it could not be squared with prior cases on physical takings, which occur only when the government "*requires* the landowner to submit to the physical occupation of his land." *Id.* The Court held that the rent control ordinance—"even considered against the backdrop" of the residency law—"[did] not authorize an unwanted physical occupation of petitioners' property." *Id.* at 532. Instead, the ordinance regulated the "petitioners' *use* of their property, and thus [did] not amount to a *per se* taking." *Id.*

The Landlords also misconstrue the State's position as "mandat[ing] that Plaintiffs house their nonpaying and lease breaking tenants indefinitely." ECF No. 55 at 3. This is also wrong. As *Yee* stated, and the State has readily acknowledged, "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528; *see* ECF No. 40 at 19. This is not that case: The Landlords "invited" and "voluntarily rented" their units to renters. 503 U.S.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

at 527–28. The Moratorium did not continue in perpetuity, and it allowed the Landlords to "change the use" of their land if they sought to sell or occupy the property themselves. *Id.* at 528; *see* Procl. 20-19.6. The Moratorium also permitted the Landlords to evict or terminate a tenancy "when necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident." Procl. 20-19.6.

Second, the Landlords misunderstand the State's argument about property that owners voluntarily open for occupation by others. *See* ECF No. 55 at 4–5. The State's argument is that, based on the principles stated in *Cedar Point Nursery* and *Yee*, regulations on how people treat those whom they have *invited* onto their properties are distinguishable from regulations "granting a right to invade property closed to the public." ECF No. 52 at 4 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2077). Like the private property owners in *Yee*, the Landlords "voluntarily open their property to occupation by others," so they "cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee*, 503 U.S. at 531.

Third, the Landlords contend "[t]here is no principled reason for concluding that property is not taken" based on their voluntary invitation of tenants to their properties. ECF No. 55 at 5. But this invitation is central to the Court's holdings that the challenged laws in *Florida Power* and *Yee* did not effect *per se* takings. *See Yee*, 503 U.S. at 528 ("Petitioners' tenants were invited by petitioners, not forced upon them by the government."); *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252–53 (1987) (explaining that the public utility landlords "voluntarily entered into leases with cable

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

company tenants" and distinguishing "between a commercial lessee and an interloper with a government license").

Instructive here, a federal district court has already treated *Cedar Point Nursery* as distinguishable in evaluating an eviction moratorium in place in San Diego County. *See S. Cal. Rental Housing Ass'n v. County of San Diego*, No. 3:21CV912-L-DEB, 2021 WL 3171919, at *8 (S.D. Cal. July 26, 2021). The court held that the plaintiff had not shown a likelihood of success on the merits on its Contracts Clause and Takings Clause claims, *see id.* at *4–9, and explained why *Cedar Point Nursery* did not control the Takings Clause analysis:

> Unlike the landowners in *Cedar Point* who were forced to allow unionizing activity on their property for a specified amount of time, the landowners here invited the renters to inhabit their rental units, make them their homes, and abide by the rental agreements. No "physical invasion" has occurred here. Although renters cannot be evicted during the temporary duration of the Ordinance, landlords have not lost their right to exclude as did the owners in *Cedar Point*.

Id. at *8. The same holds true here. The Landlords—like the property owners in *Southern California Rental Housing Association*—invited their tenants onto their properties. Those tenants were not forced upon the Landlords by the State. And the Landlords have not lost their right to exclude.

III. CONCLUSION

Cedar Point Nursery does not change the precedent: regulations like the Moratorium that govern the use of property without physically invading it do not effect a *per se* taking. The Court should grant summary judgment to the State.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

DATED this 4th day of August, 2021.

ROBERT W. FERGUSON
Attorney General

s/ Cristina Sepe
CRISTINA SEPE, WSBA #53609
BRIAN H. ROWE, WSBA #56817
Assistant Attorneys General
JEFFREY T. EVEN, WSBA #20367
Deputy Solicitor General
800 5th Avenue, Ste. 2000
Seattle, WA 98104
(206) 474-7744
cristina.sepe@atg.wa.gov
brian.rowe@atg.wa.gov
jeffrey.even@atg.wa.gov
Attorneys for Defendants

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 4th day of August, 2021, at Tacoma, Washington.

s/ Cristina Sepe

Cristina Sepe, WSBA #53609
Assistant Attorney General
800 5th Avenue, Ste. 2000
Seattle, WA 98104
(206) 474-7744
cristina.sepe@atg.wa.gov